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UNITED NATIONAL INSURANCE COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO/OAKLAND DIVISION

INTERSTATE FIRE & CASUALTY
COMPANY,

Plaintiff,

v.

UNITED NATIONAL INSURANCE
COMPANY and DOES 1 through 10,

Defendants.

UNITED NATIONAL INSURANCE
COMPANY,

Counterclaimant,

v.

INTERSTATE FIRE & CASUALTY
COMPANY and Roes 1 through 10,

Counterdefendants.

Action No.: C 07-04943 MHP

UNITED'S RESPONSE TO ORDER TO
SHOW CAUSE; DECLARATION OF
JAMES C. NIELSEN.

1 UNITED'S RESPONSE TO ORDER TO SHOW CAUSE.

2 On July 31, 2008, the Court entered an order that this action "be transferred, *sua*
3 *sponte*, to the District of New Mexico, unless one or more parties shows CAUSE in
4 writing within fourteen (14) days of the date of this order why the court should not so
5 act." (Order 3:16-18.) The order also indicated that the currently scheduled hearing date
6 for the cross-motions for summary judgment is vacated until further notice. Defendant
7 and counterclaimant United National Insurance Company respectfully submits the
8 following response to the Court's order to show cause, and urges the Court, in the
9 interests of both judicial economy and fairness to this defendant, not to transfer the action
10 and to proceed with hearing the cross-motions for summary judgment.

11 United and plaintiff and counterdefendant Interstate Fire & Casualty Company
12 both seek recoupment in connection with an underlying action styled *Ben Tracy, as*
13 *Personal Representative of the Estate of Marilyn Tracy, Deceased v. Lovelace Sandia*
14 *Health d/b/a/ Albuquerque Regional Medical Center*. The Tracy action settled in May
15 2007, with United contributing \$100,000 and Interstate contributing \$399,000 on behalf
16 of their mutual insured, Cirrus Medical Staffing LLC. As the order to show cause notes,
17 the Court has jurisdiction over this matter under 28 U.S.C. § 1332(a), and venue is proper
18 under 28 U.S.C. § 1441(a) because United removed this action from Marin County
19 Superior Court.

20 The original plaintiff, Fireman's Fund Insurance Company, apparently selected
21 Marin County Superior Court for this action because Fireman's Fund is headquartered in
22 Novato. Because Fireman's Fund is a major employer and political actor in Marin, and
23 because United was concerned about possible local bias, United removed the action to this
24 Court. Never having been consulted on where Fireman's Fund chose to sue, United also
25 evaluated the possibility of a change of venue. United considered New Mexico, where the
26 underlying action was venued, and North Carolina, the location of Cirrus's headquarters
27 and where some of the key communications took place. United determined that New
28 Mexico, in particular, and North Carolina lacked legal authority addressing the key issues

1 in this litigation. Prior experience litigating in New Mexico has taught us that New
2 Mexico has minimal jurisprudence in many areas, including insurance law. California, by
3 contrast, has a developed body of jurisprudence on insurance law, including on issues of
4 claims-made insurance at issue here. Moreover, in light of the lack of any interest in the
5 dispute by New Mexico (because this case involves no New Mexico citizens and because
6 the New Mexico litigation was settled) or by North Carolina (because the North Carolina
7 insured was fully protected and neither insurer resides there), and in light of the lack of
8 any apparent, material distinction in the law in either of those states, United saw no reason
9 to burden the Court with a motion to change venue. The case, after all, had to be decided
10 somewhere, and California seemed as good as any other jurisdiction for that purpose.

11 By order dated March 27, 2008 (Docket No. 22), Interstate was subsequently
12 substituted in as the sole plaintiff and cross-defendant in lieu of its sister company,
13 Fireman's Fund, after plaintiff's counsel determined that Fireman's Fund had not issued a
14 policy to Cirrus.

15 At the status conference on March 3, 2008, the parties informed the Court that this
16 action presents legal issues primarily, which could be presented to the Court upon a joint
17 statement of undisputed facts and resolved by cross-motions for summary judgment. The
18 Court, accordingly, set a hearing date of August 18, 2008, for cross-motions for summary
19 judgment, with each side to file opening and opposing briefs on July 21 and August 4,
20 2008, respectively. United and Interstate have filed their opening and opposing briefs,
21 along with a joint statement of undisputed facts and stipulated evidence. As shown in the
22 cross-motions, both United and Interstate independently have accepted California law, and
23 United's motion demonstrates that California law accords with New Mexico and North
24 Carolina law to the extent that those states' courts have addressed the issues presented.

25 Because there are no disputed facts and the case can be resolved on the cross-
26 motions for summary judgment, there is no need to transfer this action for the convenience
27 of witnesses or the parties, as live testimony will not be necessary. Nor is a transfer
28 necessary to provide access to evidence because the cross-motions are based upon

1 stipulated facts. *The Ins. Co. of the State of Penn. v. Acceptance Ins. Co.*, 2001
2 U.S.Dist.LEXIS 25978, *6 (S.D. Cal. 2001) (“When weighing a motion to transfer venue,
3 the court should consider a variety of private and public interest factors, including but not
4 limited to party and witness convenience [and] access to sources of proof ...”).

5 Moreover, transfer of the action at this stage would not serve the interests of
6 justice, because the district court in New Mexico would be required to apply California’s
7 choice-of-law rules, which, as shown in United’s motion for summary judgment, lead to
8 the application of California law. *Van Dusen v. Barrack*, 376 U.S. 612, 633, 84 S.Ct. 805,
9 11 L.Ed.2d 945 (1964) (“Although as a matter of federal policy a case may be transferred
10 to a more convenient part of the system, whatever rights have acquired under state law
11 should be unaffected [;] [t]he case should remain as it was in all respects but location”);
12 *Newton v. Thomason*, 22 F.3d 1455, 1459 (9th Cir. 1994) (“Because the case was
13 transferred under 28 U.S.C. § 1404(a) from the Northern District of Illinois, we apply the
14 choice-of-law rules of Illinois”). And it appears that application of California law would
15 be necessary even if California’s choice-of-law rules didn’t apply because of the absence
16 of apposite New Mexico decisional or statutory authority. This Court, sitting in
17 California, is better positioned to apply California law to the issues raised by the cross-
18 motions for summary judgment.

19 Transfer of venue would also result in unnecessary delay and duplication of effort,
20 given that the parties have developed an agreed statement of facts and have fully briefed
21 the legal issues in order to obtain a decision as quickly as possible. The federal courts’
22 resources would be unnecessarily squandered if the New Mexico district court were
23 required to acquire the knowledge and understanding of the issues that this Court has
24 already achieved. *Ins. Co. of Penn. v. Acceptance Ins. Co.*, 2001 U.S.Dist.LEXIS 25978,
25 *8 (transfer of venue requires consideration of “what law is likely to govern, whether the
26 judge would be familiar with the applicable law, how speedy a trial could be had and any
27 other practical considerations that make trial of a case easy and expeditious”).

28 Moreover, United’s voluntary relinquishment of its right to attack Fireman’s

1 Fund's choice of venue would appear to make a *sua sponte* transfer of venue an
2 extraordinary step appropriate only in unusual circumstances not presented here.
3 *Concession Consultants, Inc. v. Mirisch*, 355 F.2d 369, 371 (2d Cir. 1966) ("Since the
4 right to attack venue is personal to the parties and waivable at will, a district judge should
5 not, in the absence of extraordinary circumstances, impose his choice of forum upon the
6 parties by deciding upon his own motion that there was a lack of proper venue").

7 Finally, a change of venue at this point would harm United, which did not
8 participate in the choice of a California forum, but which has invested in the undersigned
9 California counsel to evaluate and brief this matter. Moreover, because of a hopefully
10 transient physical condition (see declaration following), the undersigned counsel would be
11 unable to travel to New Mexico or other foreign jurisdictions to argue this matter, and
12 United would be compelled to hire new counsel and pay to have that counsel duplicate
13 California counsel's efforts.

14 For the reasons set forth above, therefore, United respectfully requests that the
15 Court not transfer this action and that, instead, the Court proceed with the fully-briefed
16 cross-motions for summary judgment.

17 Respectfully submitted,

18 NIELSEN, HALEY & ABBOTT LLP

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20
21 August 11, 2008

By: 

James C. Nielsen

Attorneys for Defendant and Counterclaimant
UNITED NATIONAL INSURANCE COMPANY

DECLARATION OF JAMES C. NIELSEN

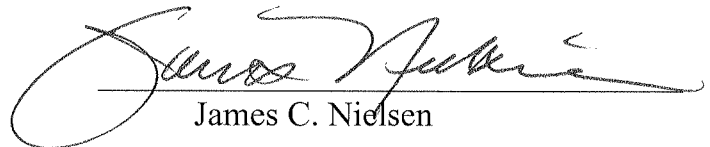
I, James C. Nielsen, declare:

1. I am a lawyer licensed in California, admitted to this Court, and counsel of record for defendant and counterclaimant United National Insurance. I make this declaration of my own personal knowledge.

2. For some months I have suffered from a peculiar and painful condition involving inflammation in my spinal cord, most reliably diagnosed by a neurologist as viral radiculitis. As a result, I am for the time being forced to do most of my work either standing or lying on my back; my hours are substantially limited; and I am unable to take public transportation that requires me to sit, such as an airplane. For at least the next few months, I am therefore unable to travel to any foreign venue to argue the motions at issue in this case, as my client has hired and paid me to do.

3. Accordingly, I believe it would unfairly prejudice my client, which had no say in where it was sued, to order this case to another jurisdiction.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 11, 2008, at San Francisco.


James C. Nielsen

Interstate Fire & Casualty Company v. United National Ins. Co.

United State District Court, Northern District Court No.: C 07-04943 MHP

PROOF OF SERVICE

I declare that:

I am a citizen of the United States, employed in the County of San Francisco. I am over the age of eighteen years, and not a party to the within cause. My business address is 44 Montgomery Street, Suite 750, San Francisco, California 94104. On the date set forth below I served the following document(s) described as:

UNITED'S RESPONSE TO ORDER TO SHOW CAUSE; DECLARATION OF JAMES C. NIELSEN

☐ (BY FACSIMILE) by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date.

☐ (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at San Francisco, California.

☐ (BY PERSONAL SERVICE) I caused such envelope(s) to be delivered by hand this date to the offices of the addressee(s).

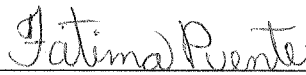
☐ (BY OVERNIGHT DELIVERY) I caused such envelope(s) to be delivered to an overnight delivery carrier with delivery fees provided for, addressed to the person(s) on whom it is to be served.

☒ (BY ELECTRONIC SERVICE) by submitting an electronic version of the document(s) to be served on all parties listed on the service list on file with the court as of this date.

Attorney for Plaintiff, Fireman's Fund Ins. Co.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on August 12, 2008, at San Francisco, California.



Fatima Puente